Case and Comment.

NOTES OF

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CASE AND COMMENT.

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Quem deus vult perdere.

The growing disrespect of our legislatures is a noticeable fact. The active partisans in either party continue to applaud vigorously, and some of them honestly, everything done by their party, and to condemn as idiotic and corrupt everything done by the opposite party. With the disinterestedness of a paid claque they are always at the front manufacturing public sentiment. On the other hand the men who disapprove shyster political methods as much when practiced in their own party as when practiced by their opponents, are not always ready to push into print with protests and so bring upon themselves insulting charges of "treachery to their party." The result is that public comment on party action by men in that party is left mostly to those who support it through thick and thin, right or wrong. One collateral result is that an under-current of dissatisfaction among quiet supporters of the party may get deep and strong, while the "ever faithful" whose own political prospects require them to keep "regular" go on shouting their approval in utter ignorance of the fact that strength has departed from them.

Never in this generation has there been so much dissatisfaction with party leadership as exists now among the members of both political parties. Party representatives in legislatures with a few exceptions continue their contemptible squabbles for petty partisan advantage, unmindful of the fact that they are steadily losing both the respect and the support of sensible men in their own party. What investigation of alleged abuses and corruption in either state or municipal affairs has been made in late years by the dominant party in any legislature except when the officers to be investigated belong, for the most part at least, to the opposite party? Has there been any such legislative investigation in any state which did not result in a partisan division of the investigating committee and corresponding majority and minority reports? When have the party leaders and party organs failed to shout "corruption" on one side, or "persecution" on the other, by strictly partisan division?

Those who live on salaries or pickings of office often forget that many people support a party solely for public reasons and in the interest of good government. The practical politicians are proving themselves dull. They are steadily alienating their support and seem too stupid to know it. The growing contempt for them finds increasing expression especially in private talk. But illustrating the old maxim that the gods first take away the brains of those whom they will destroy, they continue to ignore the interests of the public for those of their party. Every election is likely to prove a political revolution, as two or three of the latest have been, until the unspeakable imbecility and disgrace of petty partisan squabbling in our legislatures gives place to some honesty of effort for the public service. A great many thousand people have become skeptical as to

the sacredness of party when it is turned into a mere tool for the use of office seekers. Parties are possible agencies for good government, but are fast losing their sanctity as objects of worship.

Compulsory Reservation of Easement in Property Condemned.

There has been some conflict of decisions on the question whether or not the petitioner in condemning property can insist on having the damages estimated on the basis of anything else than a total condemnation of the whole estate which the law provides might be taken. The attempt to do this is of course made for the sake of mitigating damages. A late Missouri case decided by the supreme court *in banc* decides that a railroad company may stipulate in condemning a right of way to provide for the land owner certain crossings with reference to which the damages must be assessed, although the statute does not expressly provide for reserving such an easement to the land owner. St. Louis, K. & N. W. R. Co. *v.* Clark, 26 L. R. A. 751. The annotation to the case shows that the majority of the decisions on the subject are to the same effect, although there are others to the contrary. The decision seems to have clearly the better reason and the objections to it are technical. In a Massachusetts case the court said in respect to such reservations to the land owner: "It is true that in a sense it may create a new estate in him without his assent. A technical answer might be that the estate being for his benefit his consent and acceptance simultaneous with the taking will be presumed. The real answer is that the refinements and nomenclature of conveyancing will not be applied to a taking by right of eminent domain." In a few cases the court has denied the right to leave in the land owner any portion of an estate which might be condemned, in order to reduce damages for the taking without his consent, on the ground that it constituted a payment of damages in something else than money, which would be contrary to the general rule on that subject. But it seems to be a very obvious answer to this position to say that leaving a part of the estate still in the land owner, or leaving him some easement or right in the land, is not properly a payment of damages at all, but a mere abstaining from the full exercise of the right to take away his property, that is, rather a failure to cause damage than a payment of damages. The decisions in favor of the Missouri case are clearly in the majority, as well as better in reason.

Provision for Exchange as Affecting Negotiability.

The very common practice of inserting the words "with exchange" or an equivalent phrase in a check or draft, does not seem to have given rise to very many decisions as to the effect of such words on the negotiability of the instrument. The late case of Culbertson *v.* Nelson, 61 N. W. Rep. 854, holds that a bill of exchange with such a provision inserted is not negotiable. The annotation to this case in 27 L. R. A.—, shows that the comparatively small number of decisions on the subject are nearly equally divided. The ground of denial of negotiability to such instruments is of course the uncertainty of the amount of exchange which may be charged and therefore the uncertainty as to the amount to be paid by the debtor on the whole instrument. While it can hardly be denied that there is an uncertainty thus created, about half of the decisions on the question hold that the instrument is nevertheless negotiable. A conclusive answer to this objection of the want of certainty as to the amount due of such instruments can hardly be made without holding that the requirement for certainty in the amount due in a negotiable instrument is not absolute. Possibly the courts might hesitate to apply the maxim *de minimis non curat lex*, but it would seem necessary to do that or else admit that the time-honored rule requiring certainty in the amount payable on a negotiable instrument is subject to exceptions. The question does not seem to have arisen in some of the greatest commercial states, such as New York. The fairly even division of the authorities yet decided on the question and the small number of cases upon it, leave the question yet open to discussion based on principles rather than precedents.

Limitation of Action on Judgment.

An Iowa correspondent calls attention to a decision of more than ordinary interest in the case of Weiser *v.* McDowell, 61 N. W. Rep. 1094, to the effect that an action on a judgment of a court of record in Iowa is not

barred for thirty-five years, while he says the general impression for half a century has been that the period of limitation was twenty years. Section 2529 of the Iowa Code provides that actions may be brought "after their causes accrue" within certain periods, naming twenty years for actions on judgments. But section 2521 prohibits an action upon a judgment of a court of record without leave of court within fifteen years after its rendition, while another section provides that "when the commencement of an action shall be stayed by injunction or statutory prohibition the time of the continuation of such injunction or prohibition shall not be part of the time limited for the commencement of the action." This provision is regarded as settling the question and extending the period of limitation from twenty to thirty-five years. A dissenting opinion denies that the legislature had in mind any such combination of statutes or intended any such result, and says: "For more than half a century it has been accepted as the law of the state that the statute of limitations commences to run at the date of the judgment," and that "persons have accumulated property subject to execution relying upon the bar of the statute for protection. But they will now find that their property is liable to seizure for the satisfaction of amounts appearing to be due on judgments which were perhaps paid a generation ago." Probably such a combination of statutes cannot be found in any other state. In New York state the Code of Civil Procedure, sec. 382, subd. 7, limiting actions on judgments rendered in a court not of record, expressly says: "A cause of action in such a case is deemed to have accrued when final judgment is rendered."

Income Tax.

The outcome of a rehearing in the income tax cases is a matter on which it is not worth while to speculate. As the case now stands the two important questions settled are that an income tax on rents or income from real estate is within the prohibition against a direct tax except according to population, and that an income tax on municipal bonds is an unconstitutional burden on the power of states and their subdivisions to borrow money. No member of the court attacks the correctness of the prior decisions of the court on the former income tax law. While rents and income from real property were unquestionably taxed under the former law, their liability to such tax was not decided in the former cases as a separate question, and we believe was not suggested by court or counsel. It would seem clear that an income tax would be upheld by the present court without dissent if it was so framed as to exclude rents or income from real property, unless it violated the rule of uniformity. Possibly the very fact that an income tax was levied on income from personal property only, might be the ground of an attack upon it for lack of uniformity, but so far as we remember the courts generally uphold the power to tax one of the two great classes of real and personal property to the exclusion of the other, or to tax them in different ways. Nevertheless the present feeling in respect to income taxes is such that in the light of the present ignominious failure it is extremely idle to speculate on what sort of an income tax might be sustained, as it is doubtful if congress ever undertakes another one in any form.

By no means the least regrettable feature of the income tax discussion has been the recklessness with which many utterances have been made both before and since the decision. When prominent men or newspapers in one section of the country are ready with vituperation against the court in case it decides in favor of the law, while those of another section of the country are ready to do the same thing if it decides against the law, it would seem that we had a sufficient object lesson of the great need of sober and temperate discussion respecting the action of tribunals of justice. A prominent journal just before the decision declared with great emphasis that if the Supreme Court of the United States should *betray the people* in deciding the income tax cases, the people would never again have any confidence in the court. To say that such infamous talk will be disregarded on the ground that it is meaningless bluster may be partially true, but such reckless and vicious language is altogether too common and is usually accompanied by dense ignorance of the subject.

Index to Notes
IN
LAWYERS' REPORTS, ANNOTATED.

Book 26, Part 6.

Mentioning only complete notes therein contained without including mere reference notes to earlier annotations.

The part containing any note indexed will be sent with Case and Comment for one year for 75 cents.

Among the New Decisions.

Inheritance Tax.

The provision of an inheritance tax law making it applicable only to estates exceeding $2,000 in value but not exempting such sums from all estates, is held in State, Schwartz, *v.* Ferris, 9 Ohio C. C. 298, to contravene Ohio Const., art. 14, § 1, as denying the equal protection of the laws, and also to violate the constitutional rule of uniformity.

Master and Servant.

The liability of a master to a person whom his servant employs as an assistant is held in Haluptzok *v.* Great Northern R. Co. (Minn.), 26 L. R. A. 739, to depend on the authority of the servant to employ him, but it is said that such authority may be implied from the nature of the work.

Insurance.

A tearing off of three fingers, part of another, and the cutting of the hand so as to destroy the thumb joint is held in Lord *v.* American Mut. Acc. Asso. (Wis.), 26 L. R. A. 741, to justify the jury in finding that there is a loss of the hand within the meaning of an accident policy.

An option of an insurer to rebuild is held to be lost irrevocably by an express refusal with notice of an election to pay the amount of loss fixed by arbitrators, although this is given before the expiration of the time allowed for the election. Platt *v.* Etna Ins. Co. (Ill.) 26 L. R. A. 853.

Corporations.

The right of the trustees or directors of a going corporation to buy its lawful obligations at a discount and enforce them at their full-face value is sustained in Seymour *v.* Spring Forest Cem. Asso. (N. Y.) 26 L. R. A. 859.

Evidence.

A letter by one sued as a partner admitting that he was a partner at a date before the claim arose is held in Brown *v.* Wren [1895], 1 Q. B. 390, sufficient to go to the jury upon the question of his partnership, although it also states that he withdrew from the firm before the claim arose.

A conductor's statement after ejecting a passenger that he ought to have "broke his darned neck" is held in Barker *v.* St. Louis, I. M. & S. R. Co. (Mo.), 26 L. R. A. 843, inadmissible against the employer.

Railroads.

A railroad train properly equipped moving in the railroad yard is held not to be within the rule as to dangerous machines, in Barney *v.* Hannibal & St. J. R. Co. (Mo.), 26 L. R. A. 847, and the company held not to be liable for running over a child in such yard by reason of its failure to fence the yard.

Street Railways.

An attempt to compel a street railway to remove its track from the center of a street in order to permit a sewer to be constructed was unsuccessful in Des Moines City R. Co. *v.* Des Moines (Iowa), 26 L. R. A. 767.

Property which is not at all depreciated by the construction and operation of an elevated railroad is denied any damages in Metropolitan West Side Elevated R. Co. *v.* Stickney (Ill.), 26 L. R. A. 773, although the statute denies any right to set off benefits or advantages.

Libel and Slander.

A lack of any knowledge of or consent to a libelous publication in a newspaper is held insufficient to prevent criminal liability of the proprietor in State *v.* Mason (Or.) 26 L. R. A. 779.

Habeas Corpus.

Jurisdiction of a habeas corpus case on the ground of citizenship is sustained in a decision of the United States Circuit Court of Appeals in the case of King *v.* McLean Asylum, 26 L. R. A. 784, which seems to be the first decision on that exact question, where the petitioner is unlawfully restrained as an insane person.

Trespass.

A mortgagee of chattels entitled upon default to take immediate possession of and sell the property, is held in Boston M. Ins. Co. *v.* Lomgard, 26 N. S. 387, not to be guilty of trespass in entering the door and corridors which the mortgagor has the right to use in a building in which he leases rooms containing such chattels.

Duress.

The effect of duress by which written securities are extorted under threats of prosecution is considered in Thompson *v.* Niggley (Kan.), 26 L. R. A. 803, and held to defeat the obligations although the person threatened was guilty of the crime charged.

Election of Remedy.

The mere institution of an attachment suit dismissed before judgment is held in Johnson-Brinkman Com. Co. *v.* Missouri Pac. R. Co. (Mo.), 26 L. R. A. 840, not sufficient to constitute a binding election or estoppel which will prevent the plaintiff from bringing a replevin suit for the property.

Limitation of Actions.

The agreement by a wife and her paramour to deny their illicit relations which are known only to themselves and the husband, is held not to constitute a fraudulent concealment which will prevent the running of the statute of limitations against a cause of action for alienation of her affections. Sanborn *v.* Gale (Mass.), 26 L. R. A. 864.

An assignment under an insolvency law by an insurance company within one year after a loss occurred is held in *Re* St. Paul German Ins. Co. (Minn.), 26 L. R. A. 737, to give the right to file a claim for the insurance with the assignee more than a year after the loss notwithstanding a provision in the policy requiring any action or proceeding for the loss to be commenced within one year.

Coupons.

The nature of coupons payable to bearer which may be negotiated by simple delivery

when detached from bonds is discussed in Internal Imp. Fund *v.* Lewis (Fla.) 26 L. R. A. 743, which holds that the cancellation of the bond before maturity does not affect the coupons in the hands of bona fide holders.

Slave Marriages.

The nature of slave marriages is discussed in Williams *v.* Kimball (Fla.), 26 L. R. A. 746, in which it is held that the progeny of such marriages which terminated before emancipation of the parties, have no right of heirship.

County Boundaries.

A suit between counties to determine a disputed boundary line is held in Humboldt County *v.* Lander County (Nev.), 26 L. R. A. 749, to have no ground of equity jurisdiction.

Mortgages.

Tender of unpaid interest after the right to foreclose a mortgage has accrued under an option to consider the whole sum due, is held in Swearingen *v.* Lahner (Iowa), 26 L. R. A. 765, to be insufficient to defeat the foreclosure.

Landlord and Tenant.

The amount of rent recoverable from a person in possession under a lease which is void under the statute of frauds is held in Marr *v.* Ray (Ill.), 26 L. R. A. 799, to be the amount of agreed rent.

Homestead.

The peculiar doctrine of North Carolina in respect to homestead is shown in Stern *v.* Lee, 26 L. R. A. 814, holding a homestead after conveyance, although subject to a judgment lien, to be exempt from sale during the homesteader's life and thereafter during the minority of his youngest child.

A power of attorney from a wife to her husband is held in Wallace *v.* Travelers Ins. Co. (Kan.), 26 L. R. A. 806, not to express the joint consent required for the alienation or incumbrance of a homestead by him.

Electric Wire.

A guy wire of an electric light company hanging from a tree, charged with a deadly current by contact with feed wires of a railway company is held in Haynes *v.* Raleigh Gas Co. (N. C.), 26 L. R. A. 810, to make a prima facie case of negligence on the part of the electric light company, and it is held not contributory negligence for a boy ten years old to touch the wires when on or near a sidewalk.

Highways.

Failure to observe a requirement of a statute as to turning to the right on a highway is held in Reipe *v.* Elting (Iowa), 26 L. R. A. 769, not conclusive of negligence or liability, and not to defeat the defense of contributory negligence.

An attempt to vacate a highway without the prescribed statutory notice is prevented by injunction in the case of Moffitt *v.* Brainard (Iowa) 26 L. R. A. 821.

The Humorous Side.

A NEW SUBJECT IN THE LAW.—The brief in an Indiana case claiming damages for injury to a boy who was struck by a train on Sunday while he was playing a game called "stink base" says, "The authorities are silent on the subject of stink base."

IT WAS A COW.—"An animal of female sex and of the species of animal known as cattle," is the description given in a Georgia indictment when mentioning a cow.

PROFESSIONAL INSTRUMENTS. — Trained snakes were lately held to be the professional instruments of a snake charmer so as to be exempt from duty.

PRIVILEGED COMMUNICATIONS.—The late California case denying that a prayer charged to be slanderous was privileged as a communication because of the relation of minister to congregation brings out from a correspondent a suggestion that the reverend gentleman should have pleaded a confidential relation between himself and the Almighty whom he was addressing. If he pleaded, as the opinion of the court implies, a confidential relation between himself and the congregation he would seem to have adopted the point of view of a Boston reporter who once declared that a certain prayer "was the finest ever delivered to a Boston audience." He should have taken higher ground.

A HOPE OF POSTERITY.—A paragraph credited to the *Courier Journal* and possibly old enough to be recognized by some readers, will bear repetition. It states that a marriage settlement drawn by a Georgia justice of the peace limited an estate to the use of the bride of Thomas Smith during her life, "and at and after her death to any child or children she may have by the said Thomas Smith, his heirs, executors, administrators, or assigns." A lawyer whose opinion of the document was asked by Mr. Smith said that whoever drew the deed must have been determined that there should be no failure of issue.

A RECEIVERSHIP THAT RECEIVED.—In describing the condition of a corporation on which a call had been made to satisfy a claim due to the state a Louisiana opinion says: "The horde of officers—president, vice-president, cashier, receivers, directors—pass before us in this record in lengthened procession, laden with salaries and plethoric with stipends, and the lean and slippered stockholder, gaunt from forty years' exhaustion, at last holds up his hands in eager, passionate suppliance for relief from this insatiate, ever-recurring hunger for more contributions."

New Books.

Judge Ballinger of the state of Washington has a new work published by the Bancroft-Whitney Co. on the subject of community property.

The second volume of American Electrical Cases, published by Matthew Bender of Albany, is just received. This series includes all cases about electricity and its uses (except patent cases) and all telegraph, telephone, and electric light cases, whether the questions touched upon relate to the use of electricity or not.

A law book from India is something of a rarity in this country, but a valuable treatise on *Res Judicata* by Hukm Chand, who dates his preface at Delhi, is getting a good reception in America.

New Periodicals.

The Pennsylvania Law Series is the name of a new monthly edited by graduates and students of the law school of the University of Pennsylvania and published by the Blackstone Pub. Co. It has presented a good table of contents, of value to practicing lawyers.

The New York Law Review is the name of the new law publication of Cornell University. It is one of the best of the law school journals, among which are now numbered several of high grade and by no means restricted to a law-school constituency. Articles in these journals develop many valuable subjects.

The Western Reserve Law Journal is the new law publication of the law school of Western Reserve University, Cleveland, Ohio. It begins its career very creditably and promises to take a good place among law school periodicals.

The Virginia Law Register published at Lychburg, Va., is a new venture in the field of legal journalism under the editorial care of E. C. Burks. It combines contributed articles and editorials with reports of Virginia cases. It ought to have good success.

The latest Chicago enterprise in law publishing we believe is *Business Law*, the nature of which is described as condensed, plain, practical; for the business public Journals of this character are becoming common and seem to be very prosperous.

"Law. Ed."

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In this volume the digest proper, in plan, titling, thoroughly worked out classification and terse, clear cut propositions of law, follows closely its well-tried and approved predecessors. It needs no special comment. We wish, however, to call especial attention to the Table of Cases occupying something over one half the book which, unique in its effort and result, in value can hardly be over-estimated. This table, besides giving, direct and reverse titles, short and fictitious names of cases, etc.

First: Indexes the Digest by cases; shows just what points came up in each case and were decided by the court, and where each may be found in the body of the digest.

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